SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 12 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 981

SIDNEY FELBER,

Petitioner,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

PHILIP J. RYAN,
Attorney for Petitioner,
660 Madison Avenue,
New York, N. Y. 10022.

MORTON L. GINSBERG,
Of Counsel.

INDEX

	PAGE
Preliminary Statement	1
ARGUMENT:	
POINT I.—The probability, or even the possibility, of the violation of petitioner's right to due process of law is sufficient ground for this Court to grant the petition	4
POINT II.—The special responsibilities and obligations of an attorney to the Court did not justify the denial to petitioner of the equal protection of the laws	5
POINT III.—The major question raised in the instant petition could not have been raised on appeal from the original order of disbarment and is timely raised	7
CONCLUSION	10
Certificate Pursuant to Rule 58	11

CASES CITED

Estes v. Texas, 381 U. S. 532 (1964)	5
Matter of Gondelman, 20 A. D. 2d 805 (1964)	9
Matter of Robson, 284 A. D. 804 (1954)	9

PAGE

Sheppard v. Maxwell, 384 U. S. 333 (1965) 2, 5, 9

Spevak v. Klein, 385 U. S. 511 (1967) 5, 9

Tumey v. Ohio, 273 U. S. 510 5

United States v. Morgan, 346 U. S. 502 (1953) 9, 10

United States v. Morgan, 222 F. 2d 673 (2d Cir. 1955) 9, 10

Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 981

SIDNEY FELBER,

Petitioner,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that upon rehearing a Writ of Certiorari issue to review an Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, denying his petition for reinstatement to the Bar of the State of New York.

Preliminary Statement

Pursuant to Rule 58 of the Rules of this Honorable Court, no attempt will be made herein to reiterate, or to elaborate upon, the grounds urged in support of the petition for certiorari. We respectfully submit that the dissent herein has succinctly and forcefully demonstrated the

respects in which petitioner's rights pursuant to the Fourteenth Amendment have been manifestly violated.

The objective of this petition is to demonstrate that not only has petitioner been the innocent victim of that which could only have occurred through the unconstitutional procedure employed, but also that the effect of now denying to him redress of the incalculable and most severe detriment which he has suffered, may be to permit continuing and future deprivations of such rights through possibly similar procedures which are as manifestly inadequate to safeguard the rights of professional persons who are accused of wrongdoing. Although reversals are only "palliatives", *Sheppard* v. *Maxwell,* 384 U. S. 333, 363 (1965), no "remedial measures that will prevent the prejudice at its inception" (*ibid.*) will ever be considered if the result of the prejudicial proceeding is permitted to stand.

Although the petition for certiorari herein did not attempt to argue from the evidence, scrutiny of the transcript before the Official Referee in the reinstatement proceeding (filed in this Court) leads to the inescapable conclusion that petitioner was denied reinstatement because the Referee believed the testimony of petitioner's two ex-employees that petitioner instructed them to commit the fraud of which petitioner was erroneously convicted (See page 13 of the petition), and that he disbelieved petitioner. No further material corroboration of their testimony is to be found in the reinstatement proceeding than was held to have rendered petitioner's criminal conviction fatally defective (10a). Moreover, these

two witnesses were obviously highly interested in transferring the onus for the crime of which they were accused from their shoulders to petitioner. Significantly, their indictments were dismissed without trial as a result of their testimony against petitioner despite their admitted guilt (See page 8 of the petition herein).

The sole truly disinterested evidence was uncovered and brought to light in petitioner's second petition for reinstatement, through the affidavit of Mr. Lasker, who had direct and personal knowledge of the facts, and no reason to color his testimony in petitioner's behalf. As set forth at page 12 of the petition, the excerpt from his affidavit firmly and unequivocally demonstrates petitioner's innocence. It is indeed arguable that the failure of the New York Courts to grant a new hearing upon this newly discovered evidence amounted to such an abuse of discretion so as to constitute a denial of due process of law. Significantly, respondent recommended reconsideration of "the extent of punishment imposed" at that point (See pages 12-13 of the petition).

In any event, the purpose of now inspecting the relevant evidence involved is to demonstrate that, upon the basis of all of the credible evidence now in the record, petitioner was clearly innocent of any wrongdoing whatsoever. Yet, by virtue of the misplacing upon him of the burden of proof (13a), the result was that he was disbarred for life. The denial of certiorari in this case, it is respectfully submitted, permits the continuation of not only the procedure complained of but also implies that other safeguards inherent in the concept of due process

of law, may be less than strictly afforded and adhered to by the States in disciplinary proceedings.

In view of the foregoing, and for the reasons set forth in the dissent, it is respectfully submitted that certiorari should be granted herein. Inasmuch as the decision herein was handed down while petitioner's reply brief was being printed, what follows is the substance thereof, which, we respectfully submit, contains both complete responses to the points made by respondent, as well as substantial grounds available to petitioner although not previously presented.

ARGUMENT

POINT I

The probability, or even the possibility, of the violation of petitioner's right to due process of law is sufficient ground for this Court to grant the petition.

Although the quotation from the referee's report denying reinstatement, (See brief of respondent, at page 6) ambiguously stated that respondent was required "in opposition" to establish the guilt of petitioner, the following sentence, set forth in full at page 13a of the appendix, clearly indicates that the referee conceived that petitioner bore the same burden as is imposed initially upon any applicant for admission to the Bar to demonstrate his character and fitness. Morover, the citation by the Referee (12a) of the authorities holding that petitioners generally have the burden of proof in reinstatement pro-

ceedings indicates that the same was misplaced upon petitioner.

It is, therefore, probable that petitioner bore the burden of proof in the reinstatement proceeding. Even if there existed any possibility that any rights guaranteed by the Fourteenth Amendment have been denied, a new proceeding is in order. *Estes* v. *Texas,* 381 U. S. 532, 542 (1964); *Tumey* v. *Ohio,* 273 U. S. 510, 532 (1927); *Sheppard* v. *Maxwell, supra,* at 352 (1965).

It is difficult to accept that an alien cannot be deported in the absence of clear, unequivocal and convincing evidence of his wrongdoing, *Woodby* v. *Immigration and Naturalization Service,* 385 U. S. 276 (1966), while an attorney may be disbarred for life through a procedure whereby it is probable that he himself bore the burden of proving his innocence. Disbarment proceedings are even closer to criminal prosecutions in their nature and effect (*Id,* at 285) than deportation proceedings and yet petitioner's disbarment was predicated upon *less* than "no higher degree of proof than applies in a negligence case." *Ibid.*

POINT II

The special responsibilities and obligations of an attorney to the Court did not justify the denial to petitioner of the equal protection of the laws.

As this Court recently recognized in *Spevak* v. *Klein,* 385 U. S. 511 (1967), the privilege against self-incrimination applies to a lawyer despite the special responsibilities

which a lawyer bears as an officer of the Court. This Court therein held that "lawyers also enjoy first-class citizenship." 385 U. S. at 516.

There can be no question that the lawyer's special duties or responsibilities, as the dissent herein correctly held, do not justify the types of discrimination inherent in the procedure of which the petitioner now complains. First, the automatic disbarment itself cannot be justified prior to the exhaustion of all appellate rights from the conviction.*

Second, assuming, *arguendo,* that a lawyer's special position justifies automatic disbarment prior to the exhaustion of appellate rights, no possible justification may be advanced for not reinstating the lawyer upon the total erasure of the conviction by reversal on appeal followed by the dismissal of indictment, since the public does not require protection against a lawyer who has not been convicted of any crime until and unless disciplinary proceedings are concluded against him.

Third, the respondent conceded, at page 12 of its brief, that convicted lawyers are treated differently, but claims this difference is justifiable. If the reversal of the conviction and dismissal of the indictment, as petitioner has argued (See pages 18-19 of the instant petition) had resulted solely in a suspension from practice until all appellate rights had been exhausted, petitioner could have

* In this regard, Rule 8 of this Court itself provides solely for suspension from practice before this Court upon disbarment by a State until the Court may review the case.

thus been "prevented from further participation as a minister of the laws of which he had been convicted of transgressing" (respondent's brief, page 12). The discriminatory fastening of all of the prejudicial consequences recognized by the dissent upon a lawyer disbarred solely by virtue of a void conviction, and not upon a lawyer accused of wrongdoing *de novo,* is totally unjustifiable upon any ground. Petitioner's posture after the reversal of the conviction was the same as if the facts which had led to the erroneous conviction had first been brought to the attention of the disciplinary committee *ab initio* at that point, and as if no criminal proceedings had been brought whatsoever. Clearly, the lawyer's special responsibilities could not possibly justify the deprivation of the right to practice law if disbarment could take place to any hearing whatsoever.

POINT III

The major question raised in the instant petition could not have been raised on appeal from the original order of disbarment and is timely raised.

The arguments found at page 13, *et seq.,* of the respondent's brief, regarding the untimeliness of the claims of deprivation of constitutional rights now urged by petitioner, are clearly lacking in merit. First, it is important to note respondent does not dispute that the New York Court of Appeals holds that all petitions for reinstatement are "not final within the meaning of the constitution" and cannot, therefore, be appealed to the Court of Appeals as of right where a constitutional question is presented, nor

can permission to appeal be sought where no constitutional question is raised. (See page 22 of the petition herein.)

Thus, as respondent correctly points out, the only conceivable order of which review by the Court of Appeals could possibly have been obtained either as of right or by permission, was the original disbarment order. That order, however, had been entered automatically upon the felony conviction. Thus, the sole constitutional question which could have been raised on appeal therefrom was the constitutionality of Section 90, Subdivision 4 of the New York Judiciary Law (the automatic disbarment provision) which is raised in this petition but is not the major contention of petitioner (See page 18 of the petition). The basic contention of petitioner herein is that subdivision 5 of Section 90 is constitutionally infirm, because of its failure to provide for automatic reinstatement following the reversal of the conviction. This point could certainly *not* have been raised on appeal from the original disbarment order inasmuch as the criminal conviction which had itself invoked the disbarment had not yet been reversed.

Second, although petitioner technically could have raised the questions directly involved herein following the denial of initial petition for reinstatement (or thereafter), this Court did not decide the *Schware and Konigsberg* cases until 1957, and, therefore, the contention that a denial of his federal constitutional rights had occurred was unclear as to its validity in 1944.

Third, petitioner certainly did not "sleep on his rights", (this being his fifth petition for reinstatement) and it is

not, therefore, now too late in the day to raise the questions of violations of constitutional rights presented by this petition. See *U. S.* v. *Morgan,* 346 U. S. 502 (1953); *U. S.* v. *Morgan,* 222 F. 2d 673 (2d Cir. 1955); *Sheppard* v. *Maxwell, supra.* In view of the severe consequences of dishonor, loss of professional standing, professional reputation and of livelihood (*Spevack* v. *Klein, supra,* at page 516) no different rule should apply to challenging the validity of such proceedings than in criminal cases.

Fourth, the New York Courts themselves clearly recognize the validity of reinstatement proceedings brought many years subsequent to initial disbarment, see *Matter of Robson,* 284 A. D. 804 (1954); *Matter of Gondelman,* 20 A. D. 2d 805 (1964).* . It is, therefore, incongruous for respondent to argue that time is a bar toward obtaining review of defects in the original proceedings, especially where constitutional rights are involved. See *U. S.* v. *Morgan, supra.*

Finally, the denial without opinion by the Appellate Division of the motion to amend its order does not constitute an "adequate and independent non-federal ground" inasmuch as said denial without opinion is completely equivocal as to its meaning. Moreover, this Court is not bound by such an order upon the question of whether the constitutional question was raised and necessarily de-

* Therein the Court considered newly discovered evidence adduced 24 years subsequent to the original disbarment proceeding and reinstated petitioner.

cided below inasmuch as the Petition below clearly raised the issues (see 16a-22a). If the denial by the Appellate Division of the motion to amend was indeed on ground of untimeliness, this cannot constitute an "adequate and independent non-federal ground", inasmuch as a State may not thereby prevent subsequent redress of its own denial of constitutional rights. *U. S.* v. *Morgan, supra.*

CONCLUSION

For the reasons stated, the petitioner respectfully prays that the within petition for rehearing of the order denying certiorari herein be granted.

Respectfully submitted,

PHILIP J. RYAN,
Attorney for Petitioner,
660 Madison Avenue,
New York, N. Y. 10022.

MORTON L. GINSBERG,
Of Counsel.

Certificate Pursuant to Rule 58

PHILIP J. RYAN, attorney for petitioner herein, certifies as follows:

1. That the within petition is presented in good faith and not for delay.

2. That the grounds asserted herein are restricted to substantial grounds available to petitioner although not previously presented for the reason that a reply brief containing substantially these grounds was prepared, responding to the contentions made by respondent in its brief in opposition. However, said reply brief was being printed at the time the decision herein was handed down.

PHILIP J. RYAN,
Attorney for Petitioner,
660 Madison Avenue,
New York, N. Y. 10022.